

6/20/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF
AQUARIUM PRODUCTS, INC.

Respondent.

IF&R Docket No. III-4394C

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INITIAL DECISION

DATED: June 30, 1995

FIFRA: Pursuant to Section 14(a)(4) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 1361(a)(4), the Respondent Aquarium Products, Inc. is issued a warning for the sale of a pesticide product not registered with EPA as a pesticide, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and for the sale of a misbranded pesticide product, in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

APPEARANCES:

For Complainant:

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For Respondent:

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I. PROCEDURAL HISTORY

This proceeding involves a Complaint filed by the Environmental Protection Agency (EPA or Agency) Region III (Complainant) seeking, under Section 14(a)(4) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA or the Act), 7 U.S.C. § 1361(a)(4),¹ the assessment of \$21,000 in civil penalties against the Respondent Aquarium Products, Inc. (Respondent or Aquarium) for six alleged violations of Sections 12(a)(1)(A) and 12(a)(1)(E) of FIFRA.

Count I and II of the Complaint concerns two sales of Respondent's product, the Meridian Automatic Aquarium Oxygenator (the oxygenator), one to a customer in California and the other to a customer in Colorado. Complainant contends that each transaction constitutes the sale of a non-registered pesticide in violation of Section 12(a)(1)(A) of FIFRA. Count III of the Complaint alleges that the Respondent sold another of its products, Activated Oxygen (the activator), to the same California customer identified in Count I. Complainant asserts that this also constitutes the sale of a non-registered pesticide in violation of Section 12(a)(1)(A) of FIFRA.

Counts IV and V of the Complaint set forth alleged misbranding violations in connection with the California and Colorado sales of the oxygenator described in Counts I and II. Specifically, Counts IV and V allege violations of Section 12

¹ Hereinafter, the United States Code citation of the FIFRA section involved will not be included, unless it is necessary for the purpose of clarity.

(a) (1) (E) of FIFRA. Count VI also charges that the Respondent committed a misbranding offense in violation Section 12(a) (1) (E) of FIFRA because of the California sale of the activator described in Count III of the Complaint.

In all, the Complaint involves two sales of the oxygenator and one sale of the activator (to the same customer cited in one of the oxygenator sales), and alleged misbranding in connection with all three sales. The Complainant proposed an assessment of \$3,500 for each of the six Counts, seeking a total civil penalty of \$21,000.

Aquarium duly filed its Answer to the Complaint, and both denied liability for the alleged violations and contested the amount of the civil penalty being proposed.

Moreover, Complainant filed a Motion for Accelerated Decision on March 18, 1992, so close to the scheduled evidentiary hearing date of March 31, 1992, that the Respondent's time to answer under Sections 22.16(b) and 22.07(c) of the EPA Rules of Practice (Rules), 40 C.F.R. §§ 22.16(b) and 22.07(c), did not expire until after the hearing commenced. As a result, as a preliminary matter at hearing, the Respondent was given until the post hearing briefing time to answer this motion (Tr. 5). The Respondent in its briefs did not specifically address this motion but it was clear from the evidence presented at hearing that there were contested issues of material fact both as to liability and penalty. Therefore, not only must the motion be denied under Section 22.20(a) of the Rules because of the contested

interpretation of factual issues, but the resolution of the liability and penalty matters in this initial decision have rendered the Motion for Accelerated Decision moot. Accordingly, this motion is hereby denied.

An evidentiary hearing was held in this case on March 31, 1992 through April 1, 1992, in Washington, D.C. The Complainant presented four witnesses and introduced fourteen exhibits into evidence, designated as Complainant's Exhibits 1 through 14. The Respondent presented two witnesses and introduced eight exhibits into evidence, designated as Respondent's Exhibits 1 through 8. Respondent also requested that certain of the boxes containing the Aquarium Products materials at issue be introduced into evidence. This was taken under advisement but was questioned as being necessary for the record (Tr. 294). On reflection, the request for the introduction of the Respondent's packaging boxes into evidence is hereby rejected as unnecessary for decisional purposes. The transcript of the hearing is contained in two volumes totalling 386 pages. Further, the parties submitted initial posthearing briefs May 1992 and reply briefs in June 1992.²

At the end of the hearing, Complainant also made a motion to amend Count I of the Complaint to conform to evidence presented

² The exhibits will be cited as "Comp. Ex." with the number for Complainant's exhibits (e.g., Comp. Ex. 2); "Resp. Ex." with the number for Respondent's exhibits (e.g., Resp. Ex. 1); the transcript will be cited as "Tr." with the page number (e.g., Tr. 403); and the briefs will be cited by abbreviated party designations and page number (e.g., Comp. Init. Br., p. 10).

at hearing, and this request was deferred to be covered in the post hearing briefing (Tr. 382-83). Complainant did submit, with its initial post hearing brief, a specific motion to amend Count I to conform to the evidence. Complainant states that the pesticidal claims involved were erroneously omitted from the original Complaint and argues that the Respondent was aware of Complainant's reliance on these claims in advance of the hearing. Also, Complainant asserts that the Respondent will not be prejudiced by the amendment. Respondent made only a short opposition to the motion to amend on page one of its reply brief and presented no rationale sufficient to warrant rejection of the motion. Accordingly, since leave to amend a complaint should be freely given in the absence of excessive delay, bad faith or undue prejudice, Foman v. Davis, 371 U.S. 178, 182 (1962), the Complainant's motion to amend the Complaint to conform to the evidence is granted and the Complaint is hereby deemed amended as specified in that motion.

This initial decision will consist of a statement of the material facts, descriptions of the positions of the parties with regard to the issues, an analysis and resolution of the issues, and an order disposing of the issues. Any argument in the parties' briefs not addressed specifically herein is rejected as either unsupported by the evidence or as not sufficiently persuasive to warrant comment. Any proposed findings or conclusions accompanying the briefs not incorporated directly or inferentially into the decision, is rejected as unsupported in

law or in fact, or as unnecessary for rendering this decision.

II. STATEMENT OF MATERIAL FACTS

The material facts underlying this case are basically not in dispute, although the parties do draw different interpretations from them. The purpose of this portion of the decision is to set out those facts succinctly, so the positions of the parties can be considered in context.

Aquarium is a corporation that manufactures and sells products for the aquarium industry (Tr. 234-38). One of the products manufactured and sold by the Respondent is a Meridian Automatic Aquarium Oxygenator (the oxygenator) (Comp. Ex. 4; Resp. Ex. 2). The oxygenator is in a box which contains: 1) a one quart plastic bottle having a 15% hydrogen peroxide solution called "Activated Oxygen" (the activator); 2) a plastic bottle containing an a catalyst; 3) a rubber suction cup; 4) a ceramic dish; and 5) literature including a booklet entitled "A Revolutionary New Scientific Discovery Automatic Aquarium Oxygenator", and a bulletin titled "Understanding the Aquarium as a Life Support System for Your Fish", both of which documents contain directions for use of the product. (Complaint, ¶ 3; Answer, ¶¶ 1-5; Tr. 239; Comp. Exs. 4, 5, 7, 8; Resp. Ex. 2.)

Aquarium purchases the activator from an outside supplier and relabels it for inclusion in the oxygenator box. The activator is also sold separately in quart bottles as a refill for the original activator in the oxygenator box, since the activator lasts from two weeks to more than thirty days depending

on the environment in the aquarium. (Tr. 242, 310, 329-30; Comp. Exs. 8, 10; Resp. Ex. 2.)

The oxygenator forms oxygen in an aquarium when the activator is introduced to react with the ceramic catalytic material. The oxygenator was developed by the Respondent to create a high aerobic situation in an aquarium, where aerobic bacteria would grow profusely, and aid in the environment of the aquarium. Because of the increased oxygen, the plants and fish do better, and undesirable low oxygen algae that can take over an aquarium, do not grow because of the better environment. The oxygenator does not directly act to kill algae, fungi or slime but, by having a good aerobic situation, aerobic bacteria give off enzymes that utilize or "eat" slime. Also, the high level of oxygen causes the aquatic plants to grow better, thereby inhibiting the low oxygen algae growth. Similarly, the high oxygen level acts to help prevent fungus on the fish eggs. (Tr.240-46.)

The labeling on the front panel of the box containing the oxygenator states that it prevents fouling of water from overfeeding and allows better hatching of eggs by acting on fungus (Comp. Ex. 4). Also, the label on the handle of the oxygenator box recites that the oxygenator eliminates slime build up on impellers (Comp. Ex. 5). In addition, the literature in the oxygenator box makes the following claims for the oxygenator: better hatching of eggs - acts on fungus; helps inhibit the growth of hair algae and black algae, while not affecting regular

algae or plants; that adding hydrogen peroxide keeps fish in good condition, grows fish faster, prevents oxygen depletion, controls fungus, and prevents decay causing cloudy water; and that it eliminates slime build up on filter impellers (Comp. Ex. 7; Resp. Ex. 2, pp. 3, 5).³

Neither the oxygenator nor the activator are registered by Aquarium with EPA as a pesticide product. However, the facility where the oxygenator is produced and the activator is relabeled, did, on May 31, 1989, have an EPA establishment registration number secured in connection with another of the Respondent's products. (Resp. Answer, ¶¶ 1, 24; Tr. 289-90.) Also, neither the labeling on the oxygenator box and activator, nor the literature in the oxygenator box contain an EPA pesticide product registration number. Moreover, the labeling on the oxygenator box and the activator, and the literature in the oxygenator box do not contain an ingredient statement setting out the name and percentage by weight of each active ingredient and the total percentage of all inert ingredients. Further, the labeling on the activator does not contain any directions for use, nor refer to any directions for use. (Comp. Exs. 4, 5, 7, 8; Resp. Ex. 2.)

On May 31, 1989, the Respondent made a sale of the oxygenator and the activator to a customer in Los Angeles,

³ There is also a product information bulletin for the Oxygenator, but this literature is a brochure for Aquarium's dealers and does not accompany the product (Tr. 253). Therefore, the claims on this bulletin are irrelevant. Since this bulletin does not accompany the Oxygenator, it is not part of the product labelling as defined in Section 2(p)(2) of FIFRA.

California (Comp. Ex. 10). Further, on May 31, 1989, the Respondent made a sale of the oxygenator to a customer in Denver, Colorado (Comp. Ex. 9).

III. THE POSITIONS OF THE PARTIES

1. Complainant's Position

Complainant argues that the California sale of the oxygenator and the activator as well as the Colorado sale of the oxygenator by Aquarium constituted sales of an unregistered pesticide product in violation of Section 12(a)(1)(A) of FIFRA.

Complainant takes the position that the oxygenator is a pesticide as defined in Section 2(u) of FIFRA since it is intended for the prevention and destruction of pests, namely fungus, slime, hair algae and black algae. Complainant notes that the definition of pest in Section 152.5 of the FIFRA Pesticide regulations includes fungus and algae growing where not wanted. It is clear that the fungus, the hair algae and the black algae are not wanted in the aquarium environment and, therefore, are pests. (Comp. Init. Br., pp. 3, 4.)

Moreover, it is argued by Complainant that Section 152.15 of the FIFRA Pesticide Regulations (Regulations), 40 C.F.R. § 152.15⁴, sets out that a product is "intended for" preventing and destroying pests as that term is used in Section 2(u) of FIFRA, if the seller claims, states or implies by labeling or otherwise that the product can or should be used as a pesticide.

⁴ The pertinent Code of Federal Regulations cite, 40 C.F.R., will not hereinafter be set out in the text, so the FIFRA Regulations will hereafter only be cited by their section numbers.

Complainant asserts that the labeling on the front of the oxygenator box claims that the product can be used as a pesticide by stating that it acts on fungus. It is averred that a similar pesticidal claim is made on the oxygenator box handle which sets out that the product eliminates slime on filter impellers. Further, Complainant asserts that the literature in the oxygenator box makes the following claims that the product can be used as a pesticide: 1) acts on fungus; 2) helps inhibit the growth of hair algae and black algae; and 3) controls fungus. In light of these pesticidal claims, the Complainant contends that a reasonable consumer would believe that the oxygenator is intended to be used as a pesticide and that the product is, therefore, a pesticide as defined in Section 2(u) of FIFRA. (Id. at 3-7.)

With regard to Respondent's position that the oxygenator's main purpose is to provide a better aquarium environment, not to act as a pesticide, Complainant counters that products primarily intended for non-pesticide purposes can become pesticides if pesticidal claims are involved in the marketing. Complainant points out that Section 152.10 of the Regulations provides that certain products are not considered pesticides unless a pesticidal claim is made on their label or in connection with their sale and distribution. Complainant argues that the oxygenator is such a product and that it is a pesticide since pesticidal claims are made for it in its labeling and accompanying literature. (Id. at 7.)

Concerning the activator, Complainant contends that it is

intended for use as part of the oxygenator and is also intended to be sold separately as a refill for use in the oxygenator. Therefore, Complainant asserts that the labeling and literature for the oxygenator taken together with the labeling for the activator, imply that the activator can be used for a pesticidal purpose. Accordingly, it is argued that, since pesticidal claims are made for the activator, it should, under Section 152.15 of the Regulations, be considered a pesticide. Therefore, the Complainant contends that the California sale of the activator by Aquarium constitutes the sale of an unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA. (Id. at 13-15.)

With regard to the three misbranding Counts involving the California sale of the oxygenator and activator, and the Colorado sale of the oxygenator, Complainant takes the position that the following constitutes misbranding: 1) both products, in violation of Section 2(q)(1)(D) of FIFRA, did not display a FIFRA establishment registration number even though Aquarium did have such a number; 2) the products did not have proper ingredients statements, in violation of Section 2(q)(2)(A) of FIFRA; and 3) the activator when sold as a refill did not come with directions for use, as required by Section 2(q)(1)(F) of FIFRA. Complainant argues, therefore, that all three misbranding Counts have been adequately established.

Complainant also presented an analysis of the basis for the civil penalties it proposed for the six Counts in the Complaint. The details of Complainant's position in this regard will be

covered as necessary in the analysis and resolution section of this decision, infra.

2. Respondent's Position

Aquarium asserts that the oxygenator should not be considered a pesticide under FIFRA. The Respondent argues that the design of the oxygenator ensures that only oxygen is released from the device, which not only supports aquarium fish but promotes the proliferation of aerobic bacteria, which in turn break down organic matter and nitrogen-bearing wastes, which can otherwise lead to polluted conditions favorable to noxious organisms such as low-oxygen algae. Aquarium contends that the effects of the oxygenator on aquarium pests are gradual, second order and indirect, not immediate and direct. Therefore, Respondent takes the position that the oxygenator is not a pesticide. (Resp. Init. Br., pp. 2, 3.)

Regarding the labeling, Respondent argues that the label of the oxygenator is not at issue because the Complainant failed to include it the Complaint. Aquarium further avers that, even if the label was at issue, the claims on it do not justify classifying the oxygenator as a pesticide. (Id. at 3, 4.)

Specifically, Respondent asserts that, of the nine claims made on the front panel of the oxygenator box, only one, according to Complainant, makes a pesticidal claim. Aquarium contends that this claim, better hatching of eggs - acts on fungus - is outside the scope of FIFRA, since fish eggs may be viewed as living animals, thereby coming under the exception in

Section 152.5 of the Regulations. Moreover, the Respondent argues that fungi are generally not pests in home aquariums. (Id. at 4.)

In addition, Aquarium avers that, of the ten claims on the handle of the oxygenator box, only one - eliminates slime build up on filter impellers - is arguably a pesticidal claim. In the Respondent's view, this claim is inconspicuous and so unimportant that Complainant did not cite it in a November 18, 1991 letter advising Respondent how to amend its labeling to avoid future disputes with the EPA over FIFRA jurisdiction. (Id.)

As for the claims in the literature in the oxygenator box, Respondent contends that only a small portion of the statements make arguably pesticidal claims, and again notes that the November 18, 1991 letter did not include all of the contested claims. Respondent also cites the product bulletin (Comp. Ex. 6) and the claims made therein as excludable, since Complainant failed to establish that consumers ever see this bulletin. Instead, Respondent sees the claims made on accompanying literature as incidental. (Id. at 5.)

Respondent takes the position that the question presented is whether a product sold to provide a high oxygen aquarium environment to support fish and keep the aquarium clean, becomes a pesticide because of a few incidental statements in the products accompanying literature, which explain that, as a consequence of the cleaning action of the product, problems with low-oxygen algae and other arguable aquarium pests are avoided or

eliminated. Aquarium submits that the answer to this question is plainly no. (Id. at 5, 6.)

With regard to penalty, the Respondent suggests that, if there are any violations, a warning in lieu of a civil penalty would be appropriate. Aquarium notes that Section 9(c)(3) of FIFRA authorizes warnings for minor violations and that Section 14(a)(4) provides for a warning for a violation that occurred despite the exercise of due care or which did not cause significant harm to health or the environment. The Respondent further suggests that July 2, 1990 Enforcement Response Policy for FIFRA (Penalty Policy) is inconsistent with Congressional intent since it only allows warnings where the violation is not willful or negligent - a requirement not imposed by FIFRA. In any event, Aquarium submits that the Complainant did not meet its burden of proof to show that the Respondent had acted negligently, e.g. that Aquarium should have known that the oxygenator would be considered a pesticide by the Agency. Since the principle purpose of the oxygenator is to promote fish welfare and since its effects on aquarium pests is incidental and indirect, the Respondent argues that, given Aquarium's size and limited involvement with FIFRA, it cannot reasonably be faulted for being unaware of the Agency position that a few incidental pesticide claims on the labeling of a product sold primarily for non-pesticidal purposes would render the product a pesticide under FIFRA. (Id. at 6-8.)

The Respondent further contests the treatment of the refill

sale of the activator as a sale of a separate pesticide product. Aquarium notes that the Complainant's position that the oxygenator is a pesticide is based on the premise that it is a device (i.e., physical apparatus) that contains a pesticide active ingredient (i.e., the activator). Therefore, the Respondent argues that the activator should not be considered a separate pesticide product. (Id. at 9.)

Aquarium also points out that the Agency has the discretion to treat multiple sales of an unregistered or mislabeled product as a single violation. In addition, the Respondent disputes the Complainant treating each of the three sales as not one but two violations of FIFRA, that is, sale of an unregistered pesticide and sale of a misbranded pesticide. Aquarium asserts that the two violations are not independent, as that term is used in the Penalty Policy or, in the language of the previous penalty policy, independent and substantially distinguishable. The Respondent notes that it is impossible for an unregistered pesticide to be in full compliance with FIFRA's labeling regulations, since an unregistered pesticide cannot carry an Agency registration number on its labeling. Moreover, Aquarium contends that the labeling for the oxygenator substantially satisfied the FIFRA Pesticide Regulations since it included a hazard warning, first aid information, directions for use, name and address of the manufacturer, and an ingredient statement. The few label deficiencies, Respondent avers, are technical in nature and have no significance in terms of safety or

environmental protection. Therefore, Aquarium asserts that it would be inappropriate to assess additional penalties for these minor labeling violations, particularly since the Respondent was not aware that the oxygenator should be registered as a pesticide. Aquarium submits that at most only a single violation should be found and that, if it is determined that a violation or violations occurred, a warning in lieu of a penalty should be imposed. (Id. at 9-13.)

IV. ANALYSIS AND RESOLUTION

As set out in the Statement of Facts, supra, it has been established: that there were two sales of the oxygenator and one sale of the activator by the Respondent; that these products were not registered with the Agency as pesticides; that neither the labeling and literature accompanying the oxygenator nor the label of the activator contains a pesticide registration number, an EPA establishment registration number, or a full ingredients statement. Therefore, one of the primary issues presented is whether the oxygenator and the activator are pesticides as defined in FIFRA. If they are pesticides, then it follows that each of the three sales involved constitutes a sale of unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA. Moreover, if pesticides, then each of the three sales might also be considered as a sale of a misbranded pesticide since the labeling and literature of the products did not contain a pesticide registration number, an EPA establishment number or a full ingredients statement. The starting point is the question

of whether the oxygenator and activator are pesticides under FIFRA.

In pertinent part, a pesticide is defined as follows in Section 2(u) of FIFRA:

- (u) Pesticide. The term "pesticide" means (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant,

Section 152.3(s) of the Regulations provides substantially the same definition of a pesticide.

Moreover, as Complainant correctly argues, under Section 152.15 of the FIFRA Pesticide Regulations, a product is intended for preventing and destroying pests if the seller claims, states or implies by labeling or otherwise that the product can or should be used as a pesticide.

Further, under Section 2(t) of FIFRA a pest is defined as:

- (t) Pest. The term "pest" means (1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the administrator declares to be a pest under section 136w (c) (1) of this title.

Again, the definition of pest in Section 152.5 of the Regulations is consistent in pertinent part with the statutory definition. The Regulation sets out that an organism is a pest if it is: any plant growing where not wanted, including, inter alia, any alga, fungus or other microorganisms.

With this statutory and regulatory framework, an analysis

can be made regarding whether the oxygenator and the activator are pesticides under FIFRA. The two products will be considered seriatum, beginning with the oxygenator.

1. The Oxygenator

Initially, it is reasonable to conclude that fungus, slime, hair algae and black algae in an aquarium are pests as defined in the Act and Regulations. Fungus is specifically mentioned as a pest in both the statutory and regulatory definition. Hair algae and black algae are aquatic plants growing where not wanted, thereby falling under the above set out definition of pest in Section 152.5 of the Regulations. And, slime can be considered an other microorganism deleterious to man and the environment, which also brings it under the definition of pest in Section 152.5.

While the primary purpose of the oxygenator is to provide a better environment in an aquarium by increasing the oxygen content, it must be determined whether the product was also intended for preventing, destroying, repelling or mitigating the above described pests, which would make it a pesticide under both the statutory and regulatory definitions of pesticide set out above. To determine whether the oxygenator is intended for these pesticidal purposes, it is appropriate to turn to Section 152.15 of the Regulations, which provides that a substance is intended for a pesticidal purpose if the seller claims, states or implies, by labeling or otherwise, that the product can or should be used as a pesticide.

The uncontested facts show that the label on the oxygenator box states that the product acts on fungus and that the handle on the box sets out that the oxygenator eliminates slime build up on filter impellers. Further, the literature in the oxygenator box states that the product: acts on fungus; inhibits the growth of hair algae and black algae; controls fungus; and eliminates slime build up on filter impellers. In light of this, the labeling and literature accompanying the oxygenator make pesticidal claims and a reasonable person would conclude that the product is intended to be used as a pesticide. Therefore, the oxygenator is determined to be a pesticide as defined in Section 2(u) of FIFRA and Section 152.3(s) of the Regulations.

It should also be clarified that the oxygenator fits under statutory and regulatory definitions of pesticide as a mixture of substances intended for mitigating pests and intended for use as a plant regulator. The oxygenator is a mixture of substances because the activator is mixed with the ceramic catalytic material, which increases oxygen in the aquarium creating the high aerobic bacteria situation that inhibits, mitigates and destroys the pests involved.

Moreover, Respondent's argument that the oxygenator is not a pesticide because it is not intended for use as a pesticide is unpersuasive. It is clear that the claims made on the product labeling classify a product as a pesticide, not the intent of the seller. Under Section 152.15 of the FIFRA Regulations, it is irrelevant what Respondent's intent may have been. The claims

made on the labeling of the oxygenator and the literature accompanying it are pesticidal, and as such, this product is a pesticide as defined in Section 2(u) of FIFRA.

Equally unpersuasive is Aquarium's additional argument that the primary purpose of the oxygenator is to produce a high oxygen environment where fish will thrive, so the pesticidal effects should only be considered a secondary benefit. Section 152.10 sets out that certain products, including cleaning agents, are not pesticides unless a pesticidal claim is made on the product's labeling or in connection with its sale and distribution. Since, as noted above, several pesticidal claims, e.g. preventing and mitigating slime, fungus and alga, are made for the oxygenator, it is irrelevant whether the pesticidal claims relate to the primary or secondary use of the product, since the Regulation makes no such distinction.

In light of the above analysis and since Aquarium has admitted that the oxygenator has not been registered as a pesticide, it must be and hereby is concluded that the Respondent is liable as charged in Counts I and II of the Complaint, of selling an unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA.

2. The Activator

The gravamen of Count III of the Complaint is that the sale of the activator as a refill for use in the oxygenator constitutes the sale by Respondent of an unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA. The rationale is

that the activator is a pesticide since it is intended for use in the oxygenator, and all the above described pesticidal claims on the labeling and literature accompanying the oxygenator, also must be considered as applying to the activator. However, it is uncontroverted that the label on the activator bottle does not have any pesticidal claims and that there is no literature accompanying the activator when sold as a refill (see Comp. Ex. 8 and Tr. 329-30).

Complainant argues that the literature accompanying the oxygenator states that refills of the activator are available from a dealer or from Aquarium; that it also sets out that a customer should only use the Aquarium activator; and that the label on the activator itself states that it is only to be used with the oxygenator. Therefore, Complainant contends that the activator is intended to be used as part of the oxygenator, a pesticide product, and is also intended to be sold separately as a refill. Complainant asserts that the labeling on the oxygenator and the labeling on the activator, taken together, imply that the activator can be used for a pesticidal purpose and, therefore, the activator is a pesticide under Section 152.15 of the Regulations. (Comp. Init. Br., p. 14.)

However, the Respondent's position that the activator is part of the oxygenator as an active ingredient and should not be treated as a separate pesticide product, is better taken. There is no evidence that the activator by itself has any pesticidal effects, and it is uncontroverted that the pesticidal effects

result from the activator's use as part of the oxygenator. As a result, the activator by itself, i. e. as a refill, should not be considered as a pesticide. The activator is merely a part of and subsumed into the oxygenator, which is the pesticide. Since the activator has no shown independent pesticidal effect on its own and since all the pesticidal claims relate to the total product, that is, the oxygenator, the activator itself as a refill should not and will not be determined to be a pesticide.⁵

In view of the above holding, Aquarium is hereby determined to be not liable for the alleged violations in Counts III and VI of the Complaint. Since the activator as a refill is not a pesticide, the Respondent cannot be held liable for its sale as an unregistered pesticide as alleged in Count III nor can the Respondent be liable for its sale as a misbranded pesticide as claimed in Count VI of the Complaint.

3. The Misbranding Violations Involving the Oxygenator

As seen from the statement of material facts, supra, the oxygenator label and accompanying literature do not contain an Agency establishment number as required by Section 2(q) (D) of FIFRA nor do they contain an ingredient statement showing the name and percentage of each active ingredient and the total percentage of all inert ingredients in the product, as required by Section 2(q) (2) (A) of FIFRA. Therefore, both the California

⁵ Further, even if the Complainant's position were adopted, for the reasons discussed infra relating to the oxygenator, a warning rather than a civil penalty would be appropriate for the alleged non-registered sale (Count III) and the alleged misbranded sale (Count VI) of the activator.

and the Colorado sale of the oxygenator constitute the sale of a misbranded pesticide in violation of Section 12(a)(1)(E) of FIFRA. As a result, Aquarium is liable for the violations charged in Counts IV and V of the Complaint.⁶

Moreover, the Respondent's assertion that each sale involving a non-registration violation and a misbranding violation should be considered as a single violation, must be rejected. In each case both violations come from the same sale, but the violations do require different elements of proof and therefore can technically be brought as separate charges. This does, however, present an aspect of double-counting and piling on, a factor that will be taken into account in the assessing the penalty, infra.

4. Penalty Assessment

Section 14(a)(4) of FIFRA directs that the following factors be taken into account when determining a penalty: the size of the business of the person charged; the effect on the person's ability to continue in business; and the gravity of the violation. Section 14(a)(4) also sets out that, if the violation occurred despite the exercise of due care or did not cause

⁶ Counts IV and V also contain allegations of misbranding since the label of the oxygenator did not have: 1) directions for use as required by Section 2(q)(1)(F) of FIFRA; 2) a use classification required by Section 2(q)(2)(B) of the Act; and 3) a pesticide registration number required by Section 2(q)(2)(C)(iv) of FIFRA. These charges were not pursued by the Complainant on brief and, while it is clear that the latter two charges would apply given the evidence of record, they do not add materially to the gravity of the two misbranding violations and these further elements of misbranding do not warrant further comment in light of the position espoused by the Complainant in its briefing.

significant harm to health or the environment, a warning may be issued in lieu of assessing a penalty. To implement this statutory responsibility, the Agency on July 2, 1990 issued the Penalty Policy. And, Section 22.27(b) of the Rules indicates that the Penalty Policy should be considered in assessing any civil penalty. The Penalty Policy will, therefore, be employed to determine the appropriate action to be taken because of the four violations for which Aquarium has been held responsible.

Computation of the penalty amount under the Penalty Policy is a five stage process, which involves: (1) determination of the gravity level of the violation; (2) determination of the size of the business category for the violator; (3) use of the civil penalty matrices to determine the dollar amount associated with the gravity level of the violation and the size of business category of the violator; (4) further gravity adjustments of the base penalty considering potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator; and (5) consideration of the effect that payment of the civil penalty will have on the violators ability to continue in business (Penalty Policy, p. 18).

Utilizing this process, the Complainant calculated a proposed penalty in this case of \$3,500.00 per violation for the six violations alleged in the Complaint. In this regard, the Complainant's assessment was mainly accurate, with certain exceptions. Further, since Aquarium has been held not to be responsible for the violations alleged in Counts III and VI, only

the remaining four Counts must be evaluated using the methodology set out in the Penalty Policy. In addition, no issue was raised regarding the effect of a penalty on Aquarium's ability to continue in business, so that factor need not be discussed.

Counts I and II, the two sales of a non-registered pesticide, involve violations of Section 12(a)(1)(A) of FIFRA, while Counts IV and V, the misbranding charges, entail violations of Section 12(a)(1)(E) of the Act. The Penalty Policy indicates that a Section 12(a)(1)(A) violation for sale of an unregistered pesticide should receive a gravity level of 2 (Penalty Policy, Appendix A, p. A-1). For a violation of Section 12(a)(1)(E), a sale of a pesticide misbranded because the label did not have a proper registration number or a proper ingredient statement, the Penalty Policy sets out that the gravity level to be assessed is 4 (id. at A-2).

The second element in the calculation is the size of Respondent's business, which is determined from Respondent's gross revenues from all sources during the prior calendar year. Since a review of Respondent's Dunn and Bradstreet (dated May 31, 1990) report indicates that Aquarium's revenues exceeded \$1 million, Category I is appropriate for this factor. (Id. at C-1, Table 2.)

Next, utilizing the Penalty Policy matrix for FIFRA Section 14(a)(1) for Counts I and II, a Gravity Level 2 and a Category I Business Size produce a base penalty figure of \$5,000.00. For Counts IV and V, a Gravity Level of 4 and a Category I Business

Size produce a base penalty figure of \$3,000.00. (Id. at 19.)

After determining the base penalty figures, the Penalty Policy requires consideration of five gravity adjustment factors: (1) pesticide toxicity; (2) harm to human health; (3) harm to the environment; (4) the compliance history of violator; and (5) the culpability of the violator (id. at 21). The values assigned to these gravity adjustment factors are set out in Appendix B of the Penalty Policy, and they can be applied to the facts of this proceeding.

For the first factor, pesticide toxicity, a value of 1 should be assigned since the oxygenator has no known chronic effects. As to the second and third factors, harm to human health and environmental harm, respectively, they also are each assigned a value of 1, since the oxygenator poses only minor potential or actual harm to human health and the environment, and any such harm is not serious or widespread. (Id. at B-1.) The fourth factor, compliance history, must be assigned a value of 0, since Aquarium has no prior FIFRA violations (id. at B-2).

The fifth gravity adjustment factor relates to the culpability of the violator (id.). On this gravity adjustment factor, the Complainant's analysis must be rejected. Complainant first assessed a value of 4 for this factor based upon a determination that the Respondent committed a knowing or willful violation of the statute or had knowledge of the general hazardousness of the action. At the hearing, Complainant changed the value of this factor to 2, stating that the violation

resulted from negligence. However, a review of the evidence in this case shows that the correct value for this factor should be 0. This was not a knowing or willful violation of FIFRA and did not result from negligence. The Respondent effectively argues that it should not have known that the oxygenator would be considered a pesticide by the Agency. It is uncontroverted that the main purpose of the oxygenator is to promote a desirable fish and plant environment in an aquarium, since the effects on pests are incidental and indirect. Because of this, Respondent correctly asserts that, given Aquarium's size and limited involvement with FIFRA, it cannot reasonably be faulted for being unaware of the EPA position that a few incidental pesticide claims on the labeling of a product sold primarily for non-pesticidal purposes would render the product a pesticide under FIFRA.

Further, Aquarium offered to institute steps immediately to correct the problem at the time of the inspection. Specifically, Respondent volunteered at the inspection to change the labeling of its products to conform to all FIFRA requirements, but was instructed to do nothing until they heard back from EPA (Tr. 310-13). Moreover, the Respondent fully cooperated with the Agency and removed the pesticidal claims from the oxygenator (Tr. 313-16; Resp. Ex. 6). Therefore, the correct value for the culpability adjustment factor is 0 (Penalty Policy, Appendix B, p. B-2).

In view of the above analysis, the total points assigned to

the five gravity adjustment factors is 3. The Penalty Policy, page 21 provides that the next step is to determine the enforcement remedy by applying the total gravity adjustment value points to Table 3 on page 22 of the Penalty Policy. Table 3 sets out that, for 3 or below gravity value adjustment points, the enforcement remedy should either be no action; a notice of warning; or a 50% reduction of matrix value. Table 3 further indicates that a 50% reduction of matrix value is recommended where multiple count violations exist, as they do in the present proceeding. This latter remedy would result in a \$4,000 total civil penalty being assessed against Aquarium.

However, when the equity factors of this case are taken into account, the Presiding Judge is not going to follow the recommendation in Table 3 that a 50% reduction of matrix value be assessed because of the multiple violations. While the Penalty Policy guidelines must be considered under Section 22.27(b) of the Rules, they are not binding and may be deviated from if proper reasons are given. In the present case, there are ample reasons to issue a warning rather than assess a monetary penalty.

First, as noted above, Aquarium was understandably unaware that the oxygenator would be considered a pesticide and was fully cooperative in taking remedial action on a reasonable basis. In addition, the Respondent correctly points out that the sales of the unregistered oxygenator involved in Counts I and II and the misbranded sales cited in Counts IV and V, could have been considered as a single violation. Moreover, the charges in

Counts IV and V stem from the same sales in Counts I and II, and the misbranding inevitably occurred since Aquarium in good faith was unaware that the oxygenator would be considered a pesticide. As mentioned previously, Counts IV and V could almost be deemed as double counting or piling on charges, particularly given the good faith and cooperativeness of the Respondent.

Further, the Act itself provides for the issuance of a warning in circumstances such as are present in this case. Section 14(a)(4) of FIFRA sets out that a warning may be issued in lieu of a penalty where the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment. There is no evidence of record that Aquarium did not exercise due care in selling the oxygenator nor is there evidence of any harm to health or the environment. Since both of these statutory criteria have been met, it is warranted to issue a warning herein, in lieu of a civil penalty.

V. ORDER⁷

Pursuant to Section 14(a)(4) of FIFRA, a warning is hereby issued to Respondent, Aquarium Products, Inc., that the four violations for which it has been held liable in this decision, constitute violations of the Federal Insecticide Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 et seq. Respondent is advised that civil penalties may be imposed under applicable provisions of Federal law for any future violation(s) of FIFRA or other Federal statutes.



Daniel M. Head
Administrative Law Judge

Dated: June 30, 1995
Washington, D.C.

⁷ Under Section 22.30(a) the Rules, 40 C.F.R. § 22.30(a), the parties may file with the Environmental Appeals Board (EAB) a notice of appeal of this initial decision and an appellate brief within 20 days after service of this initial decision on the parties. This initial decision shall become the final order of the EAB unless an appeal is taken by the parties or unless the EAB elects, sua sponte, to review the initial decision pursuant to Section 22.30(b) of the Rules. After any appeal or sua sponte review, the order of the EAB shall be the final order in this proceeding.

CERTIFICATE OF SERVICE


I, Lydia A. Guy, the Regional Hearing Clerk for Region III of the Environmental Protection Agency, hereby certify that copies of the INITIAL DECISION in the matter of Aquarium Products, Inc., Docket No. IF&R-III-439-C, were served upon the parties or their counsel of record on the date and in the matter set forth below:

Certified Mail: James Rathvon, Esquire
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DATE: JUL - 3 1995



Lydia A. Guy
Regional Hearing Clerk